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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 132.

CHARLES S. ELDER, PLAINTIFF IN ERROR,

v.

THE PEOPLE OF THE STATE OF COLORADO ON THE INFORMATION OF GEORGE STIDGER, THE DISTRICT ATTORNEY OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF COLORADO, ON THE RELATION OF CHARLES W. BADGLEY.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

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(19,931.)

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SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

I desire to call the court's attention to some further authorities pertinent to the questions involved in this case and to add my criticism of certain cases cited by the plaintiff in error upon which he seems to rely as supporting his claim of jurisdiction in this court.

As to the Question of Jurisdiction.

In discussing this question in my first brief I showed that the decision and judgment here complained of was made upon the doctrine of *stare decisis* (see pages 7 to 9 of my first brief and also pages 64 to 66 thereof). This court

has repeatedly held that in such cases this court has no jurisdiction and is concluded by the decision of the State court. All that the Supreme Court of Colorado did in the case at bar, as disclosed by the opinion printed in the transcript of record here (pages 21 to 32), was to found its judgment herein upon previous State adjudications upon provisions of its State constitution which had become settled rules of jurisprudence.

This not only does not give this court jurisdiction, but, on the contrary, conclusively shows that the court has no jurisdiction of this cause. Even though, in the opinion of this court, the court below erred in its construction of the State constitution and of the charter of Denver, and, moreover, even though the views expressed by our Supreme Court should be in conflict with views expressed by this court in other cases (which we deny), yet neither of those facts, nor both of them, would give this court jurisdiction.

Out of many cases which sustain these propositions we refer to the following:

Where a State court founded its judgment upon a State constitutional provision and prior State adjudications, this court cannot take jurisdiction over such judgment.

Bank v. Bank, 13 Wall., 432.

"If this court were to assume jurisdiction of this case, it is evident that the questions submitted for our decision would be, not whether the statutes of Ohio are repugnant to the Constitution of the United States, but whether the Supreme Court of Ohio has erred in its *construction of them.* It is the peculiar province and privilege of the State courts to construe their own statutes; and it is no part of the functions of this court to review their decisions or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary."

Bank v. Buckingham, 5 How., 317, 342-343.

The scope and meaning of a State statute as determined by the highest court of the State conclude the Federal Supreme Court in determining, on writ of error to the State court, whether or not such statute violates the Federal Constitution.

Smiley v. Kansas, 196 U. S., 447, 455.

And that, too, though the views expressed are not in harmony with those expressed by this court in other cases.

Ibid., 455.

"The Court of Appeals of Kentucky had an undoubted right to construe its own decision rendered in the case of Newport Light Co. against The City of Newport and The Dueber Company, and to declare what the judgment rendered therein really meant, and to define the scope thereof. *This neither raised nor presented any Federal questions whatever.*"

Newport Light Co. v. City of Newport, 151 U. S., 527, 538.

It should be remembered that questions involved in this cause were those relating to the extent and powers of a political and municipal corporation, the City of Denver, and that under the decisions of this court such questions are purely local and non-federal.

As was held by this court:

"It is undoubtedly a question of local policy with each State, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State."

Claiborne County *v.* Brooks, 111 U. S., 400, 410.

For numerous other decisions to the same effect by this court see those cited in—

Forsyth *v.* Hammond, 166 U. S., 506, 519.

In the last-cited case this court said:

"It is for the State to determine its political subdivisions, the number and size of its municipal corporations, and their territorial extent. These are matters of a local nature, in which the nation, as a whole, is not interested, and in which, by the very nature of things, the determination of the State authorities should be accepted as authoritative and controlling. * * * And whenever the Supreme Court of a State holds that under the true construction of its constitution and statutes the courts of that State have jurisdiction over such matters, the Federal courts can neither deny the correctness of this construction nor repudiate its binding force as presenting anything in conflict with the Federal Constitution."

Forsyth *v.* Hammond, 166 U. S., 506, 518, 519.

As stated at page 10 of my first brief, when applied to the jurisdiction of this court over the decisions of State courts, the term "Federal question" is used in its narrowest and most restricted sense. The Federal questions must not only have been actually raised and presented to the court below, but must also have been necessarily involved, else this court has no jurisdiction; for, as stated by Chief Justice Waite in discussing a writ of error in case brought here from Virginia:

"Our jurisdiction over the decisions of the State courts is limited. It is *not* derived from the citizenship of the parties, *but from the questions involved and decided.* It must appear in the record, or we cannot proceed. We act upon questions *actually* presented to the court below, not upon such as might have been presented or brought into the case, but were not. The case, therefore, having been presented to the court below for decision upon principles of *general law alone,* and it nowhere appearing that the Constitution, laws, treaties, or executive proclamations, of the United States were *necessarily* involved in the decision, *we have no jurisdiction."*

New York Life Insurance Co. *v.* Hendren, 92 U. S., 286, 287.
United States *v.* Lynch, 137 U. S., 280, 285-286.

Plaintiff in error predicates his claim of jurisdiction in this court upon the proposition that the validity of an authority under the United States is involved (see page 23 of brief of plaintiff in error), and that the interpretation he puts upon the State constitution and the charter of Denver is too obviously correct to admit of doubt or dispute (see pages 32 and 48 to 51 of brief of plaintiff in error). But it will be seen from his argument and from the opinion of the State court of which he complains that his contention does not draw in question the validity of an authority under the United States, but at most, if anything, only the construction and application of regulations of the exercise of such authority. This has been held by this court not to give it jurisdiction.

As was said by the learned Chief Justice of this court in giving the opinion of the court in United States *v.* Lynch, 137 U. S., 280, 285-286:

"It is now urged that the duty of the Fourth Auditor and of the Second Comptroller, under the last clause of section 2 of the act of 1835 and the decision of this court in relation to it, was merely ministerial, and that by the disallowance of relator's claim for mileage these officers exercised a discretion which they did not possess; *that this was an invalid exercise of an authority under the United States, and that hence the validity of the authority was drawn in question.* In order to justify this position, however, the validity of the authority must have been drawn in question *directly and not incidentally. The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed.* * * * *The contention of the relator is, that the interpretation he puts upon the act is too obviously correct to admit of dispute,* and that this court has so decided; but it does not follow, because the decision of the comptroller and auditor may have been erroneous, that the assertion of relator to that effect raises a cognizable controversy as to their authority to proceed at all. * * *

"*If we were to reverse that judgment upon the ground*

urged, it would not be for want of power in the auditor to audit the account and in the comptroller to revise and pass upon it, *but because those officers* had disallowed what they ought to have allowed *and erroneously construed what needed no construction. This would not in any degree involve the validity of their authority.*"

In support of the foregoing this court cites numerous earlier cases decided by it.

See also South Carolina *v.* Seymour, 153 U. S., 353.

It will be noticed that the relator in the Lynch case, *supra*, as does plaintiff in error here, earnestly contended that his interpretation was "too obviously correct to admit of dispute," yet this court held that did not give it jurisdiction, and said that because they "erroneously construed what needed no construction * * * would not in any degree involve the validity of their authority"—that is, the authority of the comptroller and auditor in the matter involved. If this is true of decisions of the comptroller and auditor, *a fortiori* it is true of State courts.

Very similar questions, at least so far as the jurisdiction of this court is concerned, it seems to me, were involved in two recent cases, not yet reported, in which the writs of error were dismissed for lack of jurisdiction.

No. 360, Rose *v.* Kansas, dismissed October 20, 1906.

No. 310, United States *v.* Taft, dismissed December 10, 1906.

At page 32 of his brief plaintiff in error, in support of his contention that "no untenable construction can be resorted to to defeat the jurisdiction of this court," cites Terre Haute R. R. Co. *v.* Indiana, 194 U. S., 579. That case was one where the question involved was solely whether a statute held by the Supreme Court of Indiana to be valid impaired the obligation of the contract of the railroad corporation which was plaintiff in error here; that furnished a clear

case of jurisdiction of this court. But the learned justice who wrote the opinion of this court expressly stated his doubt whether the decision of the lower court was based on "a wrong construction of the charter" of the railroad company or "on unconstitutional legislation," and adds: "We are of the opinion that we cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws," thereby distinctly showing that jurisdiction was taken not because of a wrong or untenable construction (which this court has uniformly held, as in this brief before pointed out, could not give jurisdiction), but because the statute held valid was clearly void under the Federal Constitution because it impaired the obligation of the contract. But there is no contract in the case of a charter of a municipal corporation "in the sense of the constitutional provision which prohibits the obligation of contracts being violated."

Cooley's Const. Lim. (7th ed.), 268, 388.

The Indiana case, therefore, is not pertinent to the case at bar and does not sustain the claim of jurisdiction in this case.

Criticism of Cases on Jurisdiction Cited by Plaintiff in Error.

I desire now to show that none of the cases cited by plaintiff in error at pages 33 to 36 of his brief to support his claim of jurisdiction in this court do sustain it.

Luther v. Borden, 7 How., 1, 39, 40:

This court in that case did say that the question there involved was political and not judicial, and it further said (p. 40) that *"the point, then, raised here has already been decided by the courts of Rhode Island"* (*i. e.,* in the trial of Dorr for treason), and the point decided was that the charter

government of Rhode Island and its successor, the new constitutional government, was the only lawful government in Rhode Island, and that the Dorr government was illegal (see pp. 39 and 40). This court therefore rightly added to the above quoted statement that "*the question relates, altogether, to the constitution and laws of that State;* and the well-settled rule in this court is, that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State."

And then this court immediately proceeds to ask the question, "Upon what ground could the circuit court of the United States which tried this case have departed from this rule, and disregarded and overruled the decisions of the courts of Rhode Island?" The opinion then shows that the circuit court of the United States could not disregard and overrule the State courts, and that, further, so far as the courts of the *United States were concerned, at least,* the question was political and not judicial.

So on both grounds this case is against plaintiff in error here.

Taylor v. Beckham, 178 U. S., 548, 570:

That case was a *quo warranto case* brought to this court by writ of error from the Court of Appeals of Kentucky, but it was *dismissed for want of jurisdiction.*

The two opening sentences of the opinion by the Chief Justice are both important and significant; he says:

"*It is obviously essential* to the independence of States, and to their peace and tranquillity, *that their power to prescribe the qualifications of their own officers,* the *tenure* of their offices, the *manner* of their election, and the grounds on which the tribunals before which, and the mode in which, said elections may be contested, should be *exclusive,* and *free from external interference,* except so far as plainly provided by the Constitution of the United States.

"*And where controversies over the election of State officers* have reached the State courts in the manner provided by, and been *there determined in accordance with the State constitutions and laws,* the *cases must necessarily be rare* in which the interference of this court can properly be invoked."

Boyd v. Thayer, 143 U. S., 135:

This case is not in point, because in it there were directly and solely involved certain provisions of the Federal Constitution and the acts of Congress enacted in pursuance thereof, to wit, the naturalization provisions, and this court therefore took jurisdiction and said that there was "involved the denial "of a right or privilege under the Constitution and laws of "the United States, upon which the determination of "whether Boyd was a citizen of the United States depended, "and jurisdiction to review a decision *against* such a right "or privilege necessarily exists in this tribunal."

This court then says:

"*Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen, and the title to officers shall be tried, whether in the judicial courts or otherwise.* But when the trial is in the courts, it is 'a case,' and if a *defense* is interposed under the Constitution or laws of the United States, and is *overruled,* then, as in any other case decided by the highest court of the State, this court has jurisdiction by writ of error."

This court later, in explaining the Boyd case, said in Taylor *v.* Beckham, 178 U. S., 548, 571, that it "took juris-"diction because the conclusion of the State court involved "the denial of a right or privilege under the Constitution "and laws of the United States, *upon which the determina-"tion of whether Boyd was a citizen of the United States or "not* DEPENDED, *and therefore jurisdiction to review a de-*

" cision against such right or privilege necessarily existed in " this tribunal."

In other words, the matters involved were solely an act of Congress and whether or not Boyd had complied therewith and had been denied a right or privilege under the Federal Constitution—purely Federal questions; it was not a case involving either the construction or validity of a provision of a State constitution or a State statute. It therefore is not a case in any particular analogous or pertinent to the case at bar.

Kennard v. Louisiana, 92 U. S., 480:

This was a case where plaintiff in error claimed that the Louisiana statute under which he was removed from office was in violation of the 14th amendment, because, he said, there was no "process" provided for; because he was denied a jury trial; because an appeal must be taken within one day after judgment, returnable to the Supreme Court within two days, and because judgment upon the appeal must be made final within one day thereafter.

It appears from the report of this case in the Louisiana reports (see 25 La. Ann., 238) that these so-called Federal questions were promptly and properly raised in the State courts, though overruled; so there was no question, as in the case at bar, as to plaintiff in error not having raised his alleged Federal questions; either at the proper time or at all. The question, therefore, of the jurisdiction of this court in that case was conceded and was not discussed by this court.

However, the *judgment* of the Louisiana court *was affirmed because* the *Federal questions* sought to be raised *were* held to be *without merit.* The case does not help plaintiff in error here.

In re Duncan, 139 U. S., 449:

This was a *habeas corpus* case, appealed from the Circuit Court of the United States for the Western District of Texas,

which court had dismissed Duncan's petition and denied the writ. *No question of the jurisdiction of this court over such an appeal was involved.* This court affirmed the judgment below.

At the close of the opinion this court says that—

"Whether certain statutes have or have not binding force, it is for the State to determine, and that determination in itself involves no infraction of the Constitution of the United States, raises no Federal question giving the courts of the United States jurisdiction."

We fail to see wherein this case is an authority for plaintiff in error here; if it has any value as an authority in the case at bar, it is in support of our contention.

Texas v. White, 7 Wall., 700:

This was an original proceeding brought in this court by the *State of Texas* under the constitutional provision conferring original jurisdiction upon this court in cases in which a State is a party. *The question* was raised *whether Texas was at the time of the institution of that suit one of the States of the Union* within the meaning of the Constitution; and this court, having taken judicial notice of historical facts, acts of Congress, and of the President, held that it was, and then proceeded to decide the case upon its merits. *There is nothing in that case that concerns us here.*

Green v. Barney, 15 Wall., 610:

This case simply held that a certain provision of the Constitution of Georgia was in conflict with the Federal Constitution, in that it impaired the obligation of contracts, and was therefore void, and that recognition of such constitution by Congress did not oust the jurisdiction of the courts. Inasmuch as the Supreme Court of Georgia had held the provision constitutional, and so denied the plaintiff in error of

his contract rights under the Federal Constitution, there was and could be no question of the jurisdiction of this court. But no such condition as that exists in the case at bar, for there are no contract rights here involved, and the case therefore has no importance in this discussion:

From the foregoing criticism of the cases relied upon by plaintiff in error it is apparent that none of them sustain his claim of jurisdiction.

The cases we have cited we believe conclusively demonstrate that this Court has so often decided that in cases like the one at bar it has no jurisdiction that the writ of error herein allowed by the Chief Justice of the State Supreme Court should and ought to be dismissed.

A Charter Framed under a Constitutional Provision Has No More Force Than a Legislative Charter.

As stated in my first brief, Washington's constitution permits cities to frame their own charters, but in the first case that came before the Supreme Court of that State construing that provision of their constitution, that court said:

"A charter framed under the constitutional provision is of no more or larger force than a legislative charter and can lawfully treat *only* of matters relating to the internal management and control of municipal affairs."

So that court held the charter provisions establishing a police court in Tacoma unconstitutional; that was a matter for the State alone to legislate upon.

In re Cloherty, 2 Wash., 137, 139.

In a still later case the same court held that such a charter could not provide for contested elections.

State *ex rel.* Navin *v.* Weir, 26 Wash., 501.

The Sovereignty of the State Cannot be Bargained Away or Delegated.

Special reference to this is made in my first brief, at page 67 thereof, and I only desire to add a little more here, and to quote from that eminent constitutional lawyer and writer of recent times, Judge Cooley.

While the people in adopting constitutions have not thereby divested themselves of sovereignty, yet, as Cooley says:

"By the constitution which they establish, they not only tie up the hands of their official agencies, but their own hands as well; and neither the officers of the State, nor the whole people as an aggregate body, are at liberty to take action in opposition to this fundamental law."
Cooley's Const. Lim. (7th ed.), p. 56.

And on page 892 of the same work he says:

"The voice of the people, acting in their sovereign capacity, can be of legal force only when expressed at the times and under the conditions which they themselves have prescribed and pointed out by the constitution, or which consistently with the constitution, have been prescribed and pointed out for them by statute; and if by any portion of the people, however large, an attempt should be made to interfere with the regular working of the agencies of government at any other time or in any other mode than as allowed by existing law, either constitutional or statutory, it would be revolutionary in character, and must be resisted and repressed by the officers who, for the time being, represent legitimate government."

The Supreme Court of our State has declared, not only in the decision in the case at bar, but in several prior decisions pointed out in the opinion and in my first brief, that the scheme of government given by our State constitution to Denver was and is purely municipal in character, and that

there was no intention, expressed or implied, in our constitution, either in article XX or any other part of it, to delegate the sovereign powers of the State in matters of county or State government to a charter convention of the city of Denver. Argumentatively they also said, but that was mere *obiter dictum* so far as the issues in this case were concerned, that the construction contended for by plaintiff in error would make it also in violation of the Federal Constitution.

So jealous have the courts been in the interpretation of constitutions to limit the power of the legislature, even as to elections, term of office, grounds of removal of officers, etc., as provided by the constitution, that it has been held in numerous States that the legislature cannot add to the constitutional qualifications of voters nor diminish them; nor shorten or extend the constitutional term of an office; nor practically abolish an office by repealing the provision for salary; nor add to the constitutional grounds for removal of an officer; nor provide for the choice of officers in a different mode than that prescribed by the constitution; nor, where the constitution limits the term, can an appointee under a statute providing for holding during good behavior hold beyond the constitutional term.

See numerous cases cited in Note 3 on these several points in Cooley's Constitutional Limitations (7th ed.), p. 99.

As to Plaintiff in Error Being Bound by the Judgment in His Favor in 31 Colo., 369.

In my first brief I have called attention to the fact that the plaintiff in error here, Charles S. Elder, was the relator in the original case (People *ex rel.* Elder *v.* Sours, 31 Colo., 369), decided by the Colorado Supreme Court, in which article XX of the State constitution was construed, and which decision and construction was in accordance with his then

contentions and in his favor, and has since been uniformly followed by later decisions in our Supreme Court, including the one of which he now complains. That original decision and judgment related to the same office involved in this case, which was then held by Elder. The relator in the case at bar is the successor of Elder to that office and was by the judgment of our Supreme Court in this case adjudged entitled to it. While, perhaps, strictly speaking, the parties to the case in 31 Colo., 369, and in this case are not identical, yet to all intents and purposes they are, and the subject-matter of the action was the same. In the former case they were The People of the State of Colorado on the relation of Charles S. Elder *v.* Paul J. Sours, and in the case at bar they are The People of the State of Colorado on the information of George Stidger, the district attorney, etc., on the relation of Charles W. Badgley *v.* Charles S. Elder. In other words, in the former case on one side were The People of the State of Colorado, with Elder as relator, and on the other the defendant Sours, claiming the office of treasurer; and in the case at bar on one side are The People of the State of Colorado, with Badgley as relator, and on the other the defendant, Elder, the plaintiff in error here, claiming the office of treasurer on the same grounds that Sours based his claim in the original case, decided adversely to that claim in 31 Colo., 369.

To be sure, the Sours case was one of mandamus, while this is one of *quo warranto*, but the real subject of the litigation was the same, namely the construction of article XX of our State constitution, as applied to the office of treasurer of the city and county of Denver and as to the scheme of government provided by the constitution for the city and county of Denver. Is not, therefore, the plaintiff in error bound by the decision and judgment in his favor in People *ex rel.* Elder *v.* Sours, 31 Colo., 369? May this not be a case

practically where the doctrine of *res adjudicata* may be applied?

Cooley's Const. Lim. (7th ed.), 79-82.
Forsyth *v.* Hammond, 166 U. S., 506, 516-518.

Moreover, it should be remembered that questions involved here are public and directly concern the people of the State of Colorado more than either the plaintiff in error or the relator.

This is not a case where mere private rights or interests only are involved; it affects the scheme of government for Denver. The motion recently filed herein suggesting the death of the relator Badgley and asking the substitution of his successor in office, William J. Fine, recites the fact that since the decision of the Supreme Court in the case at bar a general election was held in the city and county of Denver, at which Fine was elected treasurer for the unexpired term of Badgley—that is, to January 8 next—and also for the full term of two years beginning on said January 8 next. This shows that the public and the electors of the city and county of Denver have again, at the recurrence of another biennial election, expressed their will and filled, under the decisions of the Supreme Court of our State, the office involved in this proceeding by electing Mr. Fine thereto. This fact is not, of course, decisive of this controversy, but it is a persuasive reason why this court should both hesitate to take jurisdiction and to reverse the now long-settled and numerous decisions of the State Supreme Court as to the scheme of government for Denver authorized by our State constitution.

As was aptly said by this court in declining to take jurisdiction in a recent *quo warranto* case:

"It is obviously essential to the independence of States and to their peace and tranquillity, that their power to prescribe the qualifications of their own officers, the tenure of their offices, the manner of their election, and the grounds on which the tribunals before which, and the mode in which,

said elections may be contested, should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States," and adds that "the cases must necessarily be rare in which the interference of this court can be properly invoked."

See also

Taylor *v.* Beckham, 178 U. S., 548, 570.

Forsyth *v.* Hammond, 166 U. S., 506, 518-520.

Respectfully submitted.

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